Jurisdictional Statement

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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NUMBER 81-5621

CARL A. JOHNSON, pro se, AS HIS INTEREST MAY APPEAR, Appellant

vs.

AETNA CASUALTY & SURETY CO. OF HARTFORD, CONNECTICUT, 1616 Warren Ave., Cheyenne, Wyo., 82001 and Richard G. Burk, 1616 Warren Ave., Cheyenne, Wyo.; RICHARD L. BADER 214 East 17th. St., Cheyenne, Wyo., 82001; DAVID D. UCHNER, 400 American Nat'l. Bank Bldg., Cheyenne, Wyo., 82001; WILLIAM "BILL" MURRAY, Junior, 1616 Warren Ave., Cheyenne, Wyo., 82001 c/o Ed Murray & Sons, 122 East 17th. St., Cheyenne, Wyo., 82001; and UNKNOWNS OBSTRUCTING JUSTICE

Appellees

JURISDICTIONAL STATEMENT

In regard to the first appeal to the Supreme Court of Wyoming see 608 Pacific Second 1299, Number 5223, April 1, 1980, Appellees' Petition for Rehearing Denied April 21, 1980. The second appeal was reported as 630 Pacific Second 514, Number 5461, June 30, 1981, Appellant's Petition for Rehearing Denied July 21, 1981.

The appellant relies on the entire record including all transcripts and briefs. The gravamen of the case is the constitutionality of Wyoming Statute 33-5-117. The appellant appeared in Wyoming District Court in regard to hail damage and insurance. The appellant tried to represent his interest in that property (R-98). The appellant appeared pro se and was taken by complete surprise with the result that he was found guilty of criminal contempt and fined $50.00 (Docket 15 No. 101, Alan B. Johnson First Judicial District Judge, May 30, 1979). The transcript will show that the appellant did nothing wrong to hurt the feelings of the court, the defense, or the people of the State of Wyoming. The defense attorney, David D. Uchner misled the court (Judge Joseph F. Maier) with the result that the appellant was branded a criminal at age 75 contrary to 42 USC 1983. Wyoming Statute 33-5-117 is unconstitutional because no layman can appear pro se in court representing his interest without fear of being held in contempt and fined as a criminal. 18 ALR 2d. 910.

Re Peterson, Minnesota Supreme Court, March 31, 1950. See also Brief of Appellant, Docket 5461, Wyoming Supreme Court filed March 11, 1981, pages 1, 2, 3 and newspaper article attached.

The State of Wyoming denies due process to a pro se litigant who tries to proceed in forma pauperis unless the litigant is in the penitentiary. Wyoming Statutes 7-14-104 and 7-11-518. This conflicts with 28 USC 1915 and the Constitution of the United States, Amendments 1, 5, and 14, and the Wyoming Constitution, Article 1 Sections 2, 6, and 8.

QUESTIONS PRESENTED

1. Can a layman file a complaint in a Wyoming District Court and appear pro se in regard to his interest in property damaged by hail without fear of being held in contempt of court and being fined?

2. Can a layman proceed in forma pauperis in the courts of Wyoming?

3. Can a layman compel discovery from defendant conspirators?

4. Can an insurance company cancel a policy during litigation?

These questions are substantial because basic constitutional rights of laymen and paupers are involved.

CONCLUSION

The appellant believes review should be granted because the state courts below need a little guidance.

AFFIDAVIT

STATE OF WYOMING)
COUNTY OF LARAMIE) SS

I, Carl A. Johnson hereby certify under oath that I have mailed this Jurisdictional Statement, Notice of Appeal, and Motion to proceed in forma pauperis to the Clerk of the United States Supreme Court on this 19th. day of October 1981 and also that I have served copies of these papers on all of the attorneys for the appellees as shown in the affidavit of the Notice of Appeal to the Supreme Court of the United States.

Carl A. Johnson

Carl A. Johnson, appellant, pro se
920 House Ave. Cheyenne, Wyo. 82001

19 October 1981

Subscribed and sworn to before me this 19th. day of October 1981

Patricia Nelson

Deputy Clerk District Court

IN THE SUPREME COURT, STATE OF WYOMING

CARL A. JOHNSON, pro se, AS HIS INTEREST MAY APPEAR
Appellant (Plaintiff below)

vs

AETNA CASUALTY & SURETY CO. OF HARTFORD, CONNECTICUT, 1616 Warren Ave., Cheyenne, Wyo., 82001 and Richard G. Burk, 1616 Warren Ave., Cheyenne, Wyo.; RICHARD L. BADER 214 East 17th. St., Cheyenne, Wyo. 82001; DAVID D. UCHNER, 400 American Nat'l. Bank Bldg., Cheyenne, Wyo. 92001; and WILLIAM "BILL" MURRAY, Junior, 1616 Warren Ave., Cheyenne, Wyo., 82001 c/o Ed Murray & Sons, 122 East 17th. St., Cheyenne, Wyo., 82001; AND UNKNOWNS OBSTRUCTING JUSTICE
Appellees (Defendants below)

) Docket 5461

STATE OF WYOMING
OCT 9 1981
RITA M. WHITE
Clerk

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Carl A. Johnson, the appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Wyoming Supreme Court, "ORDER DENYING REHEARING" ENTERED and FILED on July 21, 1981 and the entire case commencing with the original complaint filed in the district court of Wyoming, First Judicial District, Docket 85-351 on the 14th. day of June 1978, R.7.

This appeal is taken pursuant to 28 U.S.C. Section 1257 (2), and 28 U.S.C. Section 2403 (b).

Carl A. Johnson

Carl A. Johnson, Appellant pro se
920 House Avenue, Cheyenne, Wyo. 82001

9 October 1981

AFFIDAVIT OF SERVICE

I, Carl A. Johnson hereby certify under oath that copies of this Notice of Appeal have been served on David D. Uchner, American National Bank Building, Richard P. Boley, American National Bank Building, Donald J. Sullivan, Deming Building 1620 Central Avenue, John C. Patton 2424 Pioneer Avenue, Gina Guy 1600 Van Lennen Avenue, Wyoming Insurance Commission 2424 Pioneer Avenue and the Wyoming State Attorney General Capitol Building, Cheyenne, Wyoming, and the clerk of the District Court.

Carl A. Johnson

I, Genie E. Bishop, certify that this document was signed before me this 9th day of October, 1981. Genie E. Bishop

"D"

LIFE & CASUALTY

DECLARATIONS

FIRE POLICY

5-26CG

☒ THE AETNA CASUALTY AND SURETY COMPANY
Hartford, Connecticut 06115, A Stock Insurance Company

☐ THE STANDARD FIRE INSURANCE COMPANY
Hartford, Connecticut 06115, A Stock Insurance Company

NAMED INSURED AND ADDRESS

CARL A JOHNSON, VINCENT J &
ANNE MARIE SIREN AS THEIR INTERESTS
MAY APPEAR
920 HOUSE AVE.
CHEYENNE, WYO 82001

(Show Number and Street or RFD, City, County, State, and Zip Code)

Policy Term	Policy Number	
3 Years	19 FP 437804	PCA

Policy Period:	
4-1-78 Inception	4-1-81 Expiration

It is important that the written portions of all policies covering the same property read exactly alike. If they do not, they should be made uniform at once.

Insurance is provided against only those perils and for only those coverages indicated below by a premium charge and against other perils and for other coverages only when endorsed hereon or added hereto.

Amount	Rate	Prepaid Term Premium Due At Inception	Annual Payment Due Under Def. Prem. Pay. Plan	PERIL(S) Insured Against and Coverage(s) Provided (Insert Name of Each)
$ 36,000	$	$	$ 40	Fire and Lightning
XXXXXXX	$	$	$ 104	Extended Coverage
	$	$	$	
	$	$	$	
$ 432 Total Premium For Policy Term under D. P. P.		Total(s) $	$ 144	

Item No.	Amount Fire or Fire and Extended Coverage, or Other Peril	Per Cent of Co-Insurance Applicable	DESCRIPTION AND LOCATION OF PROPERTY COVERED (Show construction, type of roof and occupancy of building(s) covered or containing the property covered. If occupied as a dwelling state number of families.)
1.	$ 9,000		ON THE 1-FAMILY 1-STY OWNER-OCCUPIED DWELLING OF FRAME CONSTR. LOCATED AT 920 HOUSE AVE., CHEYENNE, WYO.
2.	9,000		ON THE 1-FAMILY 1-STY NON-OWNER OCCUPIED DWELLING OF FRAME CONSTR. LOCATED AT 915 E. 10TH ST., CHEYENNE, WYO.
3.	9,000		ON THE 1-FAMILY 1-STY NON-OWNER OCCUPIED DWELLING OF FRAME CONSTR. LOCATED AT 213 E 10TH ST., CHEYENNE, WYO.
4.	9,000		ON THE 1-FAMILY 1-STY NON-OWNER OCCUPIED DWELLING OF FRAME CONSTR. LOCATED AT 914 HOUSE AVE., CHEYENNE, WYO.

5-6

A TRUE COPY
ATTEST: THE AETNA CASUALTY AND SURETY COMPANY HARTFORD, CONNECTICUT

Subject to Form No(s). attached hereto. (Insert form number(s) and edition date(s))
DF 1 RF(9-74) D-206(8-72) H0-181(2-70) IS0-105(1-77)

Mortgage Clause: Subject to the provisions of the mortgage clause attached hereto, loss, if any, on building items, shall be payable to: (Insert name(s) of mortgagee(s) and mailing address(es))

Countersignature Date 4-[illegible]-78 Agency at CHEYENNE, WYO. AGENT

IN CONSIDERATION OF THE PROVISIONS AND STIPULATIONS HEREIN OR ADDED HERETO AND OF the premium above specified, The Stock Insurance Company indicated above by ☒, herein called "This Company," for the term of **years specified above** from **inception date shown above** At Noon (Standard Time) to **expiration date shown above** At Noon (Standard Time) at location of property involved, to an amount not exceeding the amount(s) above specified, does insure **the insured named above** and legal representatives, to the extent of the actual cash value of the property at the time of loss, but not exceeding the amount which it would cost to repair or replace the property with material of like kind and quality within a reasonable time after such loss, without allowance for any increased cost of repair or reconstruction by reason of any ordinance or law regulating construction or repair, and without compensation for loss resulting from interruption of business or manufacture, nor in any event for more than the interest of the insured, against all **DIRECT LOSS BY FIRE, LIGHTNING AND BY REMOVAL FROM PREMISES ENDANGERED BY THE PERILS INSURED AGAINST IN THIS POLICY, EXCEPT AS HEREINAFTER PROVIDED,** to the property described herein while located or contained as described in this policy, or pro rata for five days at each proper place to which any of the property shall necessarily be removed for preservation from the perils insured against in this policy, but not elsewhere.

Assignment of this policy shall not be valid except with the written consent of this Company.

This policy is made and accepted subject to the foregoing provisions and stipulations and those hereinafter stated, which are hereby made a part of this policy, together with such other provisions, stipulations and agreements as may be added hereto, as provided in this policy.

STANDARD FIRE INSURANCE POLICY for Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, Wyoming.

(DTP 20-8)
(34527) 3/75

R-31

Printed in U.S.A.

IN THE SUPREME COURT, STATE OF WYOMING

APRIL TERM, A.D. 1981

IN THE SUPREME COURT
STATE OF WYOMING

JUL 21 1981

RITA M. WHITE
Clerk

CARL A. JOHNSON, pro se as his interest may appear, Appellant (Plaintiff), v. AETNA CASUALTY AND SURETY COMPANY OF HARTFORD, CONNECTICUT; RICHARD L. BADER; and UNKNOWNS OBSTRUCTING JUSTICE, Appellees (Defendants).	)	No. 5461

ORDER DENYING REHEARING

After careful consideration, it is

ORDERED that appellant's Petition for Rehearing be, and is, denied.

July 21, 1981.

By the Court

JOHN F. RAPER
Justice

Supreme Court of Wyoming
Cheyenne, Wyoming 82001

RODNEY M. GUTHRIE, CHIEF JUSTICE

Filed 29 July 1980
Order for Reassignment
Guthrie
to
Maier
See RR-45

July 28, 1980

Mr. Carl A. Johnson
920 House Avenue
Cheyenne, Wyoming 82001

Lathrop & Uchner, P.C.
P. O. Box 4068
400 American National Bank Bldg.
Cheyenne, Wyoming 82001
ATTENTION: Mr. Richard P. Boley

Sullivan, VanCourt & Ahlstrom
Teton Building
1807 Capitol Avenue
Cheyenne, Wyoming 82001
ATTENTION: Mr. Donald J. Sullivan

This letter Not in file

Re: LARAMIE COUNTY DISTRICT COURT,
FIRST JUDICIAL DISTRICT
Carl A. Johnson v. Aetna Life
& Casualty & Surety Company
of Hartford, Connecticut 06115
#85-351

Gentlemen:

I am doing something now that should have been done some time ago. It is my hope it has not created an intolerable delay. It had been my belief that I could still fairly and properly handle this case through to its disposal. However, after your appearance on the 24th, I began my study of the file to determine a proper disposal of the motion presented. During that period of effort, I examined my thought processes and attitudes and am now forced to confess that it would be most difficult if not impossible for me to make a fair and proper disposal hereof. Life is just too short for me to further pursue this matter under such circumstances.

I have filed my order reassigning this to Judge Maier so he may make a proper reassignment hereof and am returning the file to the Clerk's office.

Very truly yours,

Rodney M. Guthrie
Wyoming Supreme Court Chief Justice (Retired)

RMG:edp

IN THE SUPREME COURT, STATE OF WYOMING

APRIL TERM, A.D. 1981

6-30-81

CARL A. JOHNSON, pro se as his interest may appear, Appellant (Plaintiff), v. AETNA CASUALTY AND SURETY COMPANY OF HARTFORD, CONNECTICUT; RICHARD L. BADER; and UNKNOWNS OBSTRUCTING JUSTICE, Appellees (Defendants).	)	No. 5461

Appeal from the District Court of Laramie County, the Honorable Paul T. Liamos, Jr., Judge.

Carl A. Johnson, pro se.

Richard P. Boley of Lathrop & Uchner, P.C., Cheyenne, for appellee Aetna Casualty and Surety Company of Hartford, Connecticut; Donald J. Sullivan, Cheyenne, for appellee Richard L. Bader.

Before ROSE, C.J., and RAPER, THOMAS, ROONEY and BROWN, JJ.

NOTICE: This opinion is subject to formal revision before publication in Pacific Reporter Second. Readers are requested to notify the Clerk of the Supreme Court, Supreme Court Building, Cheyenne, Wyoming 82001, of any typographical or other formal errors, in order that corrections may be made before final publication in the permanent volume.

ROONEY, Justice.

After a trial to the court, a judgment in this case was rendered for appellees-defendants in an action on an insurance policy and premised upon alleged hail damage on June 16, 1977 to the roof of a residence owned by appellant-plaintiff. Appellees contest the fact of such damage, but they do not contest the fact that the hazard was covered by the policy and that it was in effect on that date. Appellant also contends that appellees had conspired to prevent payment to him under the policy for the alleged damage.

The trial court found generally for appellees, and it found:

> "* * * no evidence of fraud or conspiracy on the part of defendant Bader, or Aetna, and further finding that plaintiff has failed to prove that any damage to the roof of his property, which is the subject of this lawsuit, was caused by a hailstorn [sic] occurring on June 16, 1977 * * *."

We affirm.

In neither his brief nor his reply brief did appellant indicate the legal error in the proceedings upon which he presented this appeal. During oral argument, he was requested repeatedly to designate such error. He did not do so. In his briefs and in oral argument, he recited actions taken by appellees and by others relative to his claim for damages which actions he contended to be improper, and he stated several times that the evidence to sustain his position was in the record and on the roof itself. The only potential for designation of reviewable error in appellant's briefs and argument is that the findings of fact made by the trial court were not supported by substantial evidence. But it is apparent that appellant does not understand the standard by which we must approach this issue. In his reply brief, he mistakenly says that the Wyoming Supreme Court:

> "* * * can take a case from start to finish on the merits or remand it to the lower court when justice requires. * * *" (Emphasis added.)

We have often repeated the correct standard by which we view facts found by the district court. It is as stated in Madrid v. Norton, Wyo., 596 P.2d 1108, 1117 (1979):

> "* * * There are settled appellate concepts which we follow, all for the most part favorable to the party prevailing in the trial court. An appealing party has a heavy burden to overcome. We must assume that the evidence

> in favor of the successful party is true, leave out of consideration entirely the evidence of the unsuccessful party that conflicts with it and give the evidence of the successful party every favorable inference which may reasonably and fairly be drawn from it. Jelly v. Dabney, Wyo.1978, 581 P.2d 622, 624; Laramie Rivers Co. v. Pioneer Canal Co., Wyo.1977, 565 P.2d 1241, 1243-44; West's Wyoming Digest, Appeal & Error Key Nos. 931(1) and 989. In this case, there were special findings of fact which must be construed liberally and favorably to the judgment. We presume that they are right and where the findings of the trial court are not inconsistent with the evidence, clearly erroneous, or contrary to the great weight of the evidence, they will not be disturbed on appeal. Diamond Management Corp. v. Empire Gas Corp., 594 P.2d 964 (1979); LeBar v. Haynie, Wyo.1976, 552 P.2d 1107, 1110. Moreover, the trial judge was present and observed at first hand the demeanor and expressions of the witnesses. We must not forget that when we examine the cold words of the transcript of testimony, we do not have the benefit of how the trial judge sees and hears the witness--the pitch of the voice, facial changes, the movement in the witness--all of which may tell a separate story, to be given credence. The conclusion of what preponderates is with the trier of fact. Koch v. Brown, Wyo.1965, 401 P.2d 459. Credibility of witnesses is for the trial court. Hench v. Robinson, 1955, 75 Wyo. 1, 291 P.2d 417; Eblen v. Eblen, 1951, 68 Wyo. 353, 234 P.2d 434. Appellate courts cannot try a case de novo. Marken v. Goodall, 10th Cir. 1973, 478 F.2d 1052." (Footnote omitted.)

Uncontradicted evidence in this case established the following facts: Appellant's residence was insured against hail damage by appellee Aetna Casualty and Surety Company of Hartford, Connecticut. The policy was written by Ed Murray & Sons, an insurance agency in Cheyenne. Mr. Bill Murray wrote to appellant on March 16, 1978 to inform him that the policy would not be renewed upon expiration date of March 31, 1978 because "[a] recent inspection * * * revealed that the condition of these buildings

does not meet the Aetna's underwriting criteria."1/ Shortly thereafter, appellant reported to Mr. Murray that his residence (together with three other residences) had been damaged by hail on June 16, 1977. Appellant subsequently filed a written proof of loss on April 7, 1978. Appellee Bader, an employee of McMillan Claim Service, was assigned to investigate appellant's claim. He reported in part:

> "* * * Considering the age of the roofs they obviously have been usbject [sic] to prior hail storms but to distinquish numbers and extent of damages would be impossible. A good deal of the splitting is the result of natural deterioration. Suprisingly even though the roof surfaces are old none really warrant replacement at this time. Your insured has become most insistent on presenting a claim for the accumalative [sic] damage sustained by all the structures. Lacking specific loss dates or amounts of damage he has made an offer that we consider a payment of $200 per risk or a total settlement of $800. This amount he feels will allow him to purchase the necesary [sic] materials to render repairs. I have attempted to explain the mechanics of the policy pertaining to specific losses but to no avail. Accumalative [sic] wind storms through the years have removed some shingles but this would be subject to deductibles. Accumalative [sic] hail over the years has caused some damage to the roofs, but again to identify the amount on an individual basis would be impossible. The insured contends that hail caused damage to the paint on the north and west sides of these structures but again because extreme weathering has taken its toll it would be impossible to determine to what extent if any. All in all there appears to be little foundation to make a payment based on specific damage though your insured has promised that he will pursue this matter. * * *"

Aetna denied the claim because it believed the claim was not timely filed; because it believed the property was not damaged by hail in June 1977; and because it believed that any damage to the

---

1/ Aetna did renew the policies because it felt that the original notice of cancellation was insufficient, but it later cancelled the policies pursuant to their terms.

property was an accumulation of injuries over a period of time and not a specific loss.

There was contradictory evidence relative to the fact of hail damage on June 16, 1977 and relative to the identity of the person who inspected the property and took photographs of it in the first part of March 1978. Appellant testified that there was hail damage to the roof on June 16, 1977 and that he had made temporary repairs because of such damage. He also testified that appellee Bader was the person who inspected the property and took photographs of it in March 1978, before the claim was made. He argues that such was done in conspiracy with others to cancel his insurance policy and prevent proper recovery under it. Appellant's neighbor, Leo Pacheco, also identified appellee Bader as such person. However, Mr. Murray testified that he inspected each property insured through the Ed Murray & Sons Agency shortly before the renewal date of the policy on such property to determine if the insurance on it was adequate. He testified that it was in accordance with such policy that he made an inspection of appellant's residence and took photographs of it in the first part of March 1978 and before appellant made his claim. He stated that the purpose of his inspection was to appraise the property and not for the purpose of adjusting a damage claim. Appellee Bader testified that he inspected appellant's residence only on March 29, 1978, after appellant made his claim, and that the purpose of his inspection was to adjust such claim. His report, part of which is quoted supra, was admitted into evidence, and he testified substantially in accordance therewith. He also testified that he adjusted many claims for hail damage resulting from a hail storm in Cheyenne in June 1977, but that none of the claims were in the neighborhood of appellant's property, and that that storm did not occur in that area.

Thus, substantial evidence was presented to support the finding that appellant had failed to prove a conspiracy on the part of appellees or to prove hail damage to appellant's residence on June 16, 1977. As already noted, on appeal we can look only to this evidence in favor of appellees and leave out of consideration entirely the evidence of appellant, the unsuccessful party, which is in conflict therewith.

Thus, appellant cannot prevail on the only potential for reviewable error set forth in his briefs and argument. And we cannot search further for error in the proceedings. Appellant must specify the errors upon which he seeks reversal on appeal. Marion v. City of Lander, Wyo., 394 P.2d 910 (1964), cert. denied 380 U.S. 925, 85 S.Ct. 929, 13 L.Ed.2d 810 (1965), reh. denied 380 U.S. 989, 85 S.Ct. 1352, 14 L.Ed.2d 283 (1965); Beck v. Givens, Wyo., 313 P.2d 977 (1957).

> "* * * A general attack amounting only to a statement that a trial court's findings are wrong and those proposed by appellants are

> correct is a violation of the rule requiring proper submission of briefs and the requirement that alleged errors be supported by authority and cogent argument. * * *" Scherling v. Kilgore, Wyo., 599 P.2d 1352, 1359 (1979).

Appellant represented himself in this matter. One has the right to appear pro se; but when a person chooses to do so, he must be held to the same standard as if he were represented by counsel. He cannot expect the court or the attorneys for other parties to present his case. He cannot be given an advantage by virtue of his pro se appearance, and he cannot be placed at a disadvantage thereby--other than whatever disadvantage results from his decision to proceed without the assistance of counsel. Stanton v. Chicago, B. & Q. R. Co., 25 Wyo. 138, 165 P. 993 (1917), reh. denied 25 Wyo. 138, 167 P. 709 (1917); Suchta v. O. K. Rubber Welders, Inc., Wyo., 386 P.2d 931 (1963).

Affirmed.

IN THE SUPREME COURT, STATE OF WYOMING

OCTOBER TERM, A.D. 1979

April 1, 1980

CARL A. JOHNSON, as his interest may appear, Appellant (Plaintiff), v. AETNA CASUALTY & SURETY CO. OF HARTFORD, CONN. 06115, and RICHARD G. BURK, RESIDENT CLAIM REP., 1616 Warren Ave., Cheyenne, Wyoming, RICHARD L. BADER, 214 E. 17th St., Cheyenne, Wyoming, and UNKNOWNS OBSTRUCTING JUSTICE, Appellees (Defendants).	)	No. 5223

Appeal from the District Court of Laramie County, the Honorable Rodney M. Guthrie, Judge Presiding.

Carl Johnson, pro se.

Richard P. Boley, Lathrop & Uchner, P.C., Cheyenne, for appellee Aetna Casualty & Surety Co. of Hartford, Connecticut; Donald J. Sullivan, Sullivan, Van Court & Ahlstrom, P.C., Cheyenne, for appellee Bader.

Before RAPER, C.J., McCLINTOCK, THOMAS, ROSE and ROONEY, JJ.

McCLINTOCK, Justice.

Appellant seeks review of a district court order dismissing with prejudice his separate causes of action against an insurance company and a claims adjuster for failure to pay an insurance claim on real property. The questions presented by this appeal are:

> (1) Whether the complaint as to each defendant fails to state a claim upon which relief can be granted as required by Rules 12(b)(6) and 9(b), W.R.C.P.
>
> (2) Whether the cause of action against the company fails to allege the necessary conditions precedent for recovery under an insurance policy as required by Rule 9(c), W.R.C.P.
>
> (3) Whether appellant has failed to join necessary parties as required by Rule 19, W.R.C.P.

We find that the district court erred in dismissing the complaint with prejudice and remand the case for further proceedings.

Appellant (Carl A. Johnson), Vincent J. Siren and Anne Marie Siren Levig were named plaintiffs in the original complaint, and appellee (Aetna Casualty & Surety Company of Hartford, Connecticut) and Richard G. Burk were named defendants. Appellant, acting pro se, alleged in his original complaint that four houses and outbuildings owned by him, his nephew (Vincent J. Siren) and his neice (Anne Marie Siren Levig) were damaged by a hail storm on June 16, 1977. He further alleged that this property was insured by appellee Aetna and even though appellant complied with all of the insurance policy requirements Aetna refused to pay for the hail damage and "threatened to cancel" the insurance policy. The case was set for trial and on the day of trial the district court judge granted Aetna's motion to strike the complaint on the grounds that Vincent J. Siren and Anne Marie Siren Levig did not sign the complaint nor were they represented by an attorney, and, furthermore, because appellant is not a member of the bar he could not represent these parties. Appellant was given ten days to amend his complaint. The order sustaining the motion to strike did not state that the complaint failed to state a claim for which relief could be granted, that Johnson had failed to allege necessary conditions precedent to recovery under the insurance policy, or that Vincent J. Siren and Anne Marie Siren Levig were necessary parties to the action.

Johnson timely filed an amended complaint naming only himself as plaintiff in compliance with the district court's order. The amended complaint did, however, add a new defendant, Richard L. Bader, an insurance adjuster and appellee in the case at bar. The

original defendants moved to dismiss the amended complaint because of a failure to join indispensable parties as required by Rule 19, and for failure to state a claim upon which relief can be granted. A hearing was held on the motion to dismiss and after the hearing the district court dismissed the complaint with prejudice as to defendant Richard G. Burk and reserved ruling on the motion as to Aetna. The dismissal with prejudice as to Burk was not appealed. The district court held another hearing and at that time dismissed the entire amended complaint, pursuant to Rules 12(b)6 and 12(b)7, W.R.C.P. Johnson was given an additional ten days to amend his complaint.

After Johnson timely filed his second amended complaint Aetna and Bader once again moved to dismiss the complaint. Aetna alleged that Johnson failed to join necessary parties as required by Rule 19 and Bader alleged among other things that the second amended complaint failed to state a claim upon which relief can be granted. After a hearing the district court dismissed the complaint with prejudice.

The first question that we must address is whether the district court correctly dismissed this last complaint for failure to state a claim upon which relief can be granted. This court will only sustain such a dismissal if the complaint on its face shows that the plaintiff is not entitled to relief. A complaint is not subject to dismissal unless there is no doubt that the plaintiff cannot prove any set of facts that would entitle him to relief. State Highway Commission v. Bourne, Wyo., 425 P.2d 59, 63 (1967). Wyoming Rules of Civil Procedure are based upon the theory of notice pleading. Rule 8(a)(1), W.R.C.P. The plaintiff need only plead the operative facts involved in the litigation so as to give fair notice of the claim to the defendant. Harris v. Grizzle, Wyo., 599 P.2d 580, 583 (1979). And, as we have stated before, pleadings must be liberally construed in order to do justice to the parties and motions to dismiss must be sparingly granted. Harris, supra, 599 P.2d at 583; Bourne, supra, 425 P.2d at 63.

With these standards in mind, we find that appellant's second amended complaint as to the claim against Aetna is sufficient to withstand a Rule 12(b)(6) motion. Appellant Alleges in his complaint that he owns the property that was damaged by the hail storm, that the property was insured against loss by Aetna, and that he complied with the insurance policy requirements. He further alleges that Aetna breached the insurance contract when the company refused to pay the claim made by Johnson for the hail damage.

The more difficult question is whether Johnson's complaint is sufficient to withstand a Rule 12(b)(6) motion as to the claim against appellee Bader. To begin with, Bader's motion to dismiss simply alleges that the complaint fails to state a basis or claim for which relief can be granted. And the order dismissing the

complaint against Bader with prejudice likewise does not specify why the second amended complaint is deficient. However, after reviewing the second amended complaint we have concluded that the complaint is deficient in that it fails to comply with the requirements of Rule 9(b). Johnson alleges that Bader failed to make an honest inspection of his property. Count One of the complaint against Bader alleges that Johnson is entitled to punitive damages

> ". . . from defendant Bader for fraud deceit and willful reckless disregard of the plaintiff's rights for a fair, honest and independent inspection. Bader worked diligently for his master, Aetna."

While we have just discussed the minimal requirements of notice pleading under Rules 8(a)(1) and 12(b)(6), W.R.C.P., these rules are counterbalanced by Rule 9(b). Goldberg v. Baker, N.Y.D.C., 442 F.Supp. 659, 668 (1977). Rule 9(b) requires that

> "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity."

The mere allegation of fraud in the complaint at bar is not sufficient because Rule 9(b) requires particularity as to fraudulent acts in order to inform the opposing party of the act that constitutes the claim. In order to comply with the requirement of Rule 9(b) a complaint must allege the circumstances that constitute the alleged fraud. As stated in Wright & Miller, Federal Practice and Procedure: § 1297:

> ". . . the reference to 'circumstances' is to matters such as the time, place, and contents of the false representations, as well as the identity of the person making the representation and what he obtained thereby. It is the pleading of these matters with precision that serves the rule's purpose by apprising defendant of the claim against him and of the acts relied upon as constituting the fraud charged. A pleading that simply avers the technical elements of fraud does not have sufficient informational content to satisfy the rule's requirement."

Having determined that appellant does not allege the "circumstances" of the alleged fraudulent act, we find that this portion of the complaint does not meet the requirements of Rule 9(b) and we must now consider whether the district court properly dismissed the complaint against Bader with prejudice.

Courts have varied in their approach when a pleading does not meet the requirements of Rule 9(b). Frequently courts have treated a Rule 12(b)(6) motion as a motion for a more definite statement when the pleading fails to comply with Rule 9(b). 2A Moore's Federal Practice ¶ 9.03. In Freedman v. Philadelphia Terminals Auction Co., D.C.E.D.Pa., 145 F.Supp. 820, 824 (1956), the court found that the complaint did not allege what misrepresentations plaintiffs were relying upon in alleging fraud. The court chose to treat the motion to dismiss as a motion for a more definite statement under Rule 12(e), F.R.C.P., and held that the defective count would be stricken unless the plaintiffs amended it in a manner so as to comply with Rule 9(b), F.R.C.P. Other courts have taken stricter views, dismissing the complaint or striking the defective count; however, these courts almost universally have done so with leave to amend. 2A Moore's Federal Practice ¶ 9.03. In Barry v. St. Paul Fire & Marine Ins. Co., 1 Cir., 555 F.2d 3, 13 (1977), the district court judge found that the complaint failed to state the circumstances constituting fraud, and therefore did not meet the requirements of Rule 9(b). The lower court dismissed the count without prejudice. In affirming the district court's finding the appellate court stated:

> "The judge was correct; the complaint could hardly be more vague. While the judge might have ordered a more definite statement, it was within his power to grant a dismissal without prejudice. If the plaintiffs can plead fraud with more particularity, they may file an amended complaint."

"An insufficient allegation of fraud or mistake is subject to the liberal amendment provisions of Rule 15." 5 Wright & Miller, Federal Practice and Procedure: Civil § 1300. Rule 15(a), W.R.C.P. provides that "leave [to amend] shall be freely given when justice so requires," and it also provides a procedural framework for amendments. Unless the proposed amendment to the pleading will unduly prejudice the opposing party, has not been offered in good faith, or the party seeking to amend has had repeated opportunities to cure the defect, leave to amend should be liberally granted. Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L.Ed.2d 222 (1962). This test was cited with approval by this court in Beaudoin v. Taylor, Wyo., 492 P.2d 966, 970 (1972). Furthermore,

> "[i]f the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits." Foman, supra, 371 U.S. at 182 (quoted in Beaudoin, supra, 492 P.2d at 970).

We have consistently held that

> "[t]he decision to allow amendments to pleading is vested within the sound discretion of the district court . . . and therefore subject to reversal on appeal only for an abuse of that discretion." Rose v. Rose, Wyo., 576 P.2d 458, 459 (1978).

Breazeale v. Radich, 500 P.2d 74 (1972); Beaudoin, supra, 492 P.2d at 970.

In Rose, supra, 576 P.2d at 459, Breazeale, supra, 500 P.2d at 74, and Beaudoin, supra, 492 P.2d at 970, we held that the trial judge did not abuse his descretion in allowing an amendment because there was no prejudice to the other party. In the case at bar we find that allowing appellant to amend his pleadings will not prejudice appellee Bader. In addition, the claim against Bader was offered in good faith, and appellant has not been given repeated opportunities to comply with the requirements of Rule 9(b). Furthermore, the dismissal with prejudice will prejudice appellant because his case has not been decided on the merits, thus defeating the purpose of Rule 15.

While we find that the allegation of fraud does not meet the requirements of Rule 9(b) and that it was within the sound discretion of the district court to dismiss this count, we find that it was as abuse of discretion for the district court judge to dismiss the cause of action with prejudice. We therefore partially reverse the lower court's order and dismiss Count One of the complaint against Bader without prejudice. If Johnson amends his complaint specifying the "circumstances" of the alleged fraud as required by Rule 9(b), he may proceed against appellee Bader. If the second amended complaint is not so amended within the time period provided for by the district court, the cause of action against Bader should then be dismissed with prejudice.

The second question that we must address is whether the complaint fails because it does not allege a condition precedent as required by Rule 9(c), W.R.C.P. Rule 9(c) requires that

> "[i]n pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred."

In the second amended complaint appellant alleges that "[a]t all times Carl A. Johnson has properly cared for the property, paid the premiums and done everything reasonably required of an insured." Aetna contends that because Johnson alleged that he paid the premiums he is required specifically to allege all other conditions precedent to the insurance contract.

While we recognize that some courts have held that if a party undertakes to plead specifically the conditions precedent, the pleadings will fail if all conditions precedent are not specifically pleaded, Wright & Miller, Federal Practice and Procedure: § 1303, we do not agree that in the case at bar Johnson specifically pleaded any of the conditions precedent. Johnson generally averred that he paid the insurance premiums and that he complied with all other requirements under the insurance contract. While it may be better practice to use the exact wording of the rules in pleadings, a pleader is not required to state "that all conditions precedent have been performed or have occurred" to comply with the requirements of Rule 9(c), W.R.C.P. As we recently stated in Harris v. Grizzle, supra, 599 P.2d at 583, "pleadings are to be construed liberally so as to do substantial justice."

Furthermore, the purpose of Rule 9(c) is to prevent dismissals of meritorious cases if the plaintiff fails specifically to plead occurrence of conditions precedent. As pointed out in Wright & Miller, Federal Practice and Procedure: Civil § 1302,

> "Rule 9(c) is designed to eliminate the detailed and largely unnecessary averments that resulted under the common law procedure, and to prevent nonmeritorious dismissals for failure to plead the fulfillment of conditions precedent that are not at issue in the suit. With the advent of complex commercial and insurance contracts, the burden imposed by the common law rule and the risk of technical default became sufficiently heavy to outweigh the minimal information value provided by an enumeration of the conditions precedent that had been complied with by the pleader."

For these reasons we find that the complaint in question complies with the requirements of Rule 9(c).

The final question is whether the complaint was properly dismissed for failure to join indispensable parties as required by Rule 19, W.R.C.P. This court has long recognized the traditional definition of an indispensable party.

> ". . . [A]n indispensable party is one without whose presence before the court a final decree could not be made without either affecting his interest or leaving the controversy in such a condition that its final determination might be wholly inconsistent with equity and good conscience." Oxley v. Mine and Smelter Supply Co., Wyo., 439 P.2d 661, 663 (1968).

In the original complaint the named plaintiffs were appellant, Vincent J. Siren and Anne Marie Siren Levig, and plaintiffs alleged that Aetna breached its insurance contract with them when it refused to pay for hail damage to four houses and outbuildings covered by the policy. The record reflects that Aetna issued one insurance policy insuring these four houses, and the named insureds on the policy are "CARL A. JOHNSON, VINCENT J & ANNE MARIE SIREN AS THEIR INTERESTS MAY APPEAR." The second amended complaint, the complaint that is the subject of this appeal, names only appellant as plaintiff and he is seeking recovery for breach of the insurance contract for failure to pay a claim made on property solely owned by him.

Apparently the district court was concerned with the fact that the insurance policy covered four houses and that there were three named insureds; however, we find the phrase "as their interests may appear" to be controlling. Because appellant is only seeking recovery for hail damage to the house that he owns, we see no need to join the other named insureds in the present suit. They are not indispensable parties to the present suit because their rights under the insurance policy for the houses that they own will not be altered by the present suit.

We reverse the district court order and remand for further proceedings.